IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.338 OF 2006
IN
COMPANY PETITION NO.1 OF 1982

Everest Fincap Pvt.Ltd. Applicant

versus

The Official Liquidator, being Liquidator of Bradbury Mills Ltd.

Mr.T.Subramaniyam with Ms.Rajani Iyer i/by Mehta & Girdharlal for applicants.

Mr.D.D.Madon with Mr.Vishal Maheshwari i/by Negandhi Shah and Himaytullah for HDFC.

Mr.S.H.Doctor with Mr.B.B.Parekh for O.L..

Ms.N.D.Buch for applicant in CA 739/2005.

Mr.S.C.Gupta - O.L. present.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 27th April 2006

PC :

1. This company application is preferred by the applicant for setting aside an order dated 15th December 2005 on a report which is presented by the Official Liquidator ("O.L." for short), who is arrayed as respondent to this application.

2. The O.L. who has been appointed as Liquidator of the company in liquidation, presented a report on which the order which is sought to be recalled, has been passed.

3. The Liquidator pointed out that the company in liquidation M/s.Bradbury Mills Ltd. has been ordered to be wound up by this Court by an order dated 27th January 1983. The Liquidator stood appointed with all powers under the provisions of Companies Act, 1956.

4. An immovable property belonging to the company in liquidation situate at Maulana Road, Near Jeckob Circle, Mumbai admeasuring about 28,437.29 sq.mtrs. has ordered to be sold by the Debts Recovery Tribunal, Mumbai (for short "DRT") in an application which is preferred by the United Commercial Bank and to which other financial institutions as also the company in liquidation, was a party.

5. According to the O.L; by an order dated 31st March 2005, the DRT, on an application by the United Commercial Bank, directed that the property should be sold and confirmed the sale in

favour of the applicant herein.

6. The proceedings in that behalf have been referred to in detail in the report, on which the subject order came to be passed and reference therein is made to the affidavit of the official of United Commercial Bank. It is also brought to the notice of this Court that on 21st November 2005 a letter was received by the O.L. from Advocate D.P.Desai pointing out that his clients intend to take out Miscellaneous Application before DRT praying for setting aside order dated 31st March 2005. Thereafter, attention of this Court is invited to the order dated 29th November 2005 which is passed by the Presiding Officer, DRT-I, Mumbai; a copy of which was also annexed to the report.

7. The attention of this Court was invited to the findings of the Tribunal in para no.10 of this order. The Tribunal referred to all valuation reports and observed that prima facie there are reasons to believe that the order dated 31st March 2005 was procured by suppressing material facts from the DRT.. The DRT has referred to the valuation report and ultimately passed following order :-

"

ORDER

1. The Order of confirming the sale in favour of M/s.Everest Fincap Pvt.Ltd. dated 31.3.2005 shall stand set aside on the Intervener or Guarantor, the Defendant no.7 depositing a sum of Rs.45 Crores plus Rs.50,000/- in this Tribunal within two weeks from today.

2. If such amount is deposited, the Recovery officer shall deposit the sum of Rs.45 crores for three months in Fixed Deposit with the applicant Bank and shall put the property for Public Auction after getting the same valued from the Valuer on panel of this Tribunal.

3. The amount of Rs.50,000/- be utilized for advertising for advertising the auction and valuation.

4. In addition to issuing a public notice of auction, the Recovery Officer shall also issue a notice of auction to M/s.Siddesh Construction Pvt.Ltd.

5. The Purchaser M/s.Everest Fincap Pvt. Ltd. would be at liberty to bid in the auction.

6. If M/s.Everest Fincap Pvt.Ltd. is out-bidded, the actual consideration paid by him plus the charges and cost incurred by him on the property for securing and improving the same, with interest @ 6% be reimbursed to him from the consideration received from the successful bidder.

7. M/s.Everest Fincap Pvt.Ltd. shall furnish the details of costs and expenses incurred on the property including the cost of security till the date of auction with documentary proof in support of it.

8. If the Intervener is out bidded, the amount deposited by him shall be repaid to him with accrued interest thereon excluding the cost of Rs.50,000/-.

9. If the amount is deposited by the Guarantor, it be returned to him from the consideration received from the successful bidder with interest @ 5% p.a.

10. The Recovery Officer of this Tribunal shall complete the process of auction within three months from the date of deposit of the amount by the Intervener or Guarantor.

11. The proceedings of Original application No.124/2001 would not be reopened.

12. The net sale proceeds realized by the Recovery Officer be handed over to the Official Liquidator and higher amount so received shall be proportionately distributed by the Official Liquidator to the Applicant Bank, the Defendant No.10, on the basis of their amounts of settlement i.e. Rs.22 Crores and Rs.5 Crores respectively and to the workmen and other secured and insecured creditors, if any, in accordance with the provisions of Sections 529, 529A and 530 of the Companies Act, 1956."

8. The O.L; therefore, invited attention of this Court in his report to all the above aspects and specifically contended that a fraud has been perpetrated and the sale is, therefore, vitiated. He points out that as a Liquidator, he has ample powers in law when he is appointed by this Court during the course of winding up proceedings. As a part of his duty and function, he has to seek appropriate directions. More so, when he finds that a valuable immovable property in the City of Mumbai and belonging to the company in

liquidation, has been undervalued and disposed of. Further, he invited attention of this Court in his report to certain observations and remarks of the Presiding Officer of DRT and in these circumstances, sought appropriate directions including initiating the proceedings to challenge the sale. Alternatively, since sale has been set aside now, all conditions imposed by DRT need to be challenged by appropriate proceedings before DRT and/or Debts Recovery Appellate Tribunal ("DRAT") or this Court. In his submission, a fresh public auction is called for as the earlier is vitiated by absence of prior notice to him.

9. It is this report which was placed before the learned Company Judge on 5th December 2005 and noticing it’s contents, the learned Company Judge granted prayer clauses (a) and (b) of this report.

10. The net result of the above order is that the Liquidator is at liberty to adopt appropriate proceedings in the matter of sale of the immovable property.

11. Shri Subramaniyam, learned senior counsel appearing for the applicant submits that this

order has been passed behind the back of the applicant and without any notice. He submits that the O.L. was aware that he has filed earlier reports seeking this Court's directions for deposit of certain amounts and/or disburse the amounts already deposited with him. In other words, having accepted the order of 31st March 2005 and acted in pursuance thereof, presenting such a report and seeking this Court's order thereof behind the back of the applicant, was not, therefore, permissible and request therein should not have been entertained. In his submission, once these facts are brought to the notice of this Court by the applicant, this is a fit case where this Court should recall its order on the report, restore the report and allow the applicant to make appropriate submissions. He contends that the O.L. is estopped from initiating any proceedings before the DRAT or before any other authority including this Court, to challenge the sale in favour of the applicant and in support of these submissions he has invited my attention to the orders on the earlier reports and also to the annexures of the affidavits on record. In his submission, even on merits, the sale could not be said to be vitiated because the report of Valuer relied upon by the

Liquidator is lacking in relevant and material particulars. The said report is totally untrustworthy and unreliable because the Valuer has not bothered to find out encroachments and encumbrances on the property and in that behalf he invites my attention to the further affidavit filed by the applicant and more particularly para 14 thereof.

12. On the other hand, Shri Doctor, learned senior counsel appearing for the O.L. submits that as far as the report seeking permission to adopt appropriate proceedings or to participate in the proceedings adopted against the O.L; is a matter strictly between the Court and the O.L.. It is not an adjudicatory process. It does not involve any lis. If the applicants' rights are in any manner affected, it is open for them to appear before appropriate Tribunal/Court and make submissions including raising plea of estoppel. However, it is not open for them to apply to this Court and seek setting aside of an order allowing the O.L. to adopt appropriate proceedings. In his submission, even otherwise, this is a case where there is a fraud perpetrated on the Court and the DRT has, in appeal, set aside the order passed by it on 31st March 2005. The fraud has

been perpetrated by public officials on the DRT.. It is a serious matter. It is also involving the O.L.. His role has been commented upon and in such circumstances and more so when the Liquidator is answerable to this Court in liquidation proceedings, he has thought it fit to move this Court and seek liberty to initiate appropriate proceedings. That is because in terms of the powers conferred on the Liquidator and more particularly vide Sections 456 and 457 of the Companies Act, in such matters, he is obliged to seek Court's directions. Therefore, this is not a matter where any notice was necessary to be served on the applicant. Therefore, present application must fail.

13. There is considerable merit in the submissions of Shri Doctor. The Companies Act confers powers on this Court to issue appropriate directions to the O.L.. Section 457 of the Companies Act provides for powers of Liquidator. Sub section 1 thereof states that Liquidator in a winding up proceeding by the Court, shall have power, with the sanction of the Court/Tribunal, to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name and on behalf of the company. This is

in furtherance of the powers conferred by Section 456 of the Companies Act on the Liquidator. Thus, there is no dispute that there are enough powers which enables the O.L. to seek such directions and existence of such powers, is not disputed by both sides. Section 458 of the Act confers powers on the Court to make an order to this effect that the Liquidator may exercise powers conferred upon him u/s 457(1) without seeking it's sanction or intervention; provided, exercise by the Liquidator of such powers is subject to the control of the Court.

14. Ultimately, a winding up petition is presented to the Court. It becomes Court's duty, therefore, to safeguard and protect the assets and properties of the company which is liquidated and being wound up by it. That is for the benefit of share holders, creditors as also in public interest. The position in law as far as a company in winding up and proceedings in that behalf, is now well settled. In these circumstances, and when it is brought to the notice of the O.L. by the parties who are challenging the orders of DRT, that he thought it was his bounden duty to move this Court and seek it's directions to institute appropriate

proceedings.

15. The merits of the matter are not being gone into when such an application is made and permission of this Court is sought. There is much substance in the contentions of Shri Doctor that no rights of the applicant are being affected, muchless, prejudicially, by seeking of such permission. It is not as if the applicant is not in a position to urge that such permission being granted, the proceedings initiated by Official Liquidator, are not maintainable. It will be open to the applicant to point out whenever such proceedings are initiated by impleading itself as a party or otherwise that the Liquidator could not have initiated them and his conduct in the matter estopps him from doing so. It is not that these arguments are not open merely because this Court passed directions sought by the Liquidator on his report. All contentions on merits of all parties to such proceedings, are always open and are never concluded by such directions. It is essentially a matter between the O.L. and the Court. Therefore, I do not find any reason to recall the order of 14th December 2005. In these circumstances, there is no need to entertain

other submissions of Shri Subramaniyam. These contentions are expressly kept open. As they touch merits of the matter, they can be raised before the appropriate Court in proceedings to be adopted by the O.L..

16. The submission of Shri Subramaniyam that the O.L. suppressed material facts while seeking permission of this Court, also need not be considered, because the same can always be urged in support of the pleas of estoppel and maintainability.

17. At this stage Shri Subramaniyam seeks continuation of the ad-interim order dated 20th January 2006 passed by brother Vazifdar, J.. In that order itself it is made clear that an appeal is already filed. The O.L., therefore, can never be restrained from prosecuting legal proceedings. More so, when he is doing so not personally but on behalf company in liquidation. However, other directions in this order may continue for a period of eight weeks. Company Application dismissed. No order as to costs.

(S.C.DHARMADHIKARI, J.)